No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE NIAGARA FALLS POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. VI, 3115–3132) is reported in 137 F. (2d) 787. The opinions and orders of the Commission are set forth in the record (R. V, 2891–2932, 3035–3042).

JURISDICTION

The decision of the circuit court of appeals was rendered on July 29, 1943 (R. VI, 3115). A petition for rehearing (R. VI, 3133–3167) was denied on September 2, 1943 (R. VI, 3169), and judgment was entered on October 4, 1943 (R. VI, 3170). The petition for a writ of certiorari was

filed on October 22, 1943. Jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Following extensive hearings, the Federal Power Commission, by two opinions and orders, determined (pursuant to § § 3 and 4 (a) of the Federal Water Power Act of 1920 (§ § 3 (13) and 4 (b) of the Federal Power Act of 1935)) the actual legitimate original cost of petitioner's hydroelectric project, finding that the provision in petitioner's license for a determination of the "fair value" of the project under Section 23 of the Act was unauthorized by the statute and therefore invalid. In determining the cost of the project the Commission disallowed three items which it found to be "write-ups" which had been transferred to petitioner's accounts when it was organized by a consolidation of its predecessor companies. Petitioner was directed to set up its accounts to reflect the Commission's determination and to charge the disallowed amounts to surplus. On review, the Commission's orders, with a minor modification, were affirmed by the court below. The questions are:

1. Whether the "fair value" provisions of petitioner's license were unauthorized by Section 23

of the Act, and therefore not binding upon the Commission.

2. Whether the Commission, in determining the actual legitimate original cost of petitioner's project, properly disallowed the "write-ups" transferred to petitioner's accounts when it was formed by a consolidation of its predecessor companies.

STATUTES INVOLVED

The relevant provisions of The Federal Water Power Act of 1920 in its original form are set forth in Appendix A, *infra*. The relevant provision of the Federal Power Act of 1935, amending the Federal Water Power Act of 1920, is set out in Appendix B, *infra*.

STATEMENT

The Niagara Falls Power Company ("petitioner"), pursuant to a Federal Power Commission license, operates a hydroelectric project at Niagara Falls, New York, which diverts water from the Niagara River, a navigable stream, marking the international boundary between the United States and Canada (R. V, 2904). When the license was issued on March 2, 1921, the project consisted principally of the predecessor developments of the Schoellkopf and Stetson companies which were consolidated to form petitioner in 1918.

The original Schoellkopf company, the Niagara Falls Hydraulic Power and Manufacturing Com-

pany, was organized in 1878 and was brought under regulation, because of its distribution facilities, in 1907, when the New York Public Service Commission Law was enacted. The Schoellkopfs then decided to segregate such facilities in a new corporation, Cliff Electrical Distributing Company ("Cliff"), which they organized for that purpose on March 15, 1909 (R. IV, 2147). By agreement of May 4, 1909, the distribution facilities were transferred to Cliff which issued therefor $590,000 of bonds, $250,000 of stock, and $172.63 in cash—a total of $840,172.63, which was $328,471.51 in excess of the book cost of such property to the original Schoellkopf company (R. IV, 2109–10).[1] Shortly thereafter, on March 26, 1910, the Schoellkopfs organized a second new company, the Hydraulic Power Company of Niagara Falls ("Hydraulic"), into which they merged their original company, with its remaining property (R. IV, 2122–3). In this merger Hydraulic issued $14,500,000 of its bonds and stock in exchange for the $500,000 of stock of the original Schoellkopf company, which resulted in an $11,800,482.24 increase of the book cost of the properties transferred (R. IV, 2129, 2139).[2]

The upstream Stetson interests in 1886 organized the Niagara Falls Hydraulic Tunnel, Power

[1] This $328,471.51 increase was the first item disallowed by the Commission (R. V. 2919); see p. 11, *infra*.

[2] This $11,800,482.24 increase was the second item disallowed by the Commission (R. V. 2921); see pp. 11–12, *infra*.

and Sewer Company of Niagara Falls, New York, which name was soon changed to the Niagara Falls Power Company ("Niagara constituent") (R. IV, 2161–2). In 1889 a group of New York financiers, headed by Edward Dean Adams, organized the Cataract Construction Company ("Cataract") which entered into a series of contracts with Niagara constituent under which Cataract acquired control of and agreed to finance the enterprise—Cataract receiving, in addition to its expenditures, a 33⅓% profit of $3,307,975.83 which was charged to the construction accounts of Niagara constituent (R. IV, 2169, 2193, 2205).[3]

In 1918, the Schoellkopf companies (Cliff and Hydraulic) and the Stetson company (Niagara constituent) were consolidated to form petitioner under a special Act of the New York Legislature (R. IV, 2323). The securities of the consolidating companies were exchanged for those of the petitioner and the amounts appearing on their books (with intercompany eliminations) were transferred to petitioner's accounts (R. V, 2927–8). The Schoellkopfs received $13,500,000 par value of petitioner's common stock and the Stetson interests received $984,566.70 of common and $11,515,400 of preferred stock (R. IV, 2213).

Regulation of Diversions from Niagara River.—The diversions through the Schoellkopf and Stet-

[3] This profit of $3,307,975.83 was the third item disallowed by the Commission (R. V, 2924); see p. 12, *infra*.

son plants were originally made pursuant to authorizations obtained from the State of New York (New York Laws, 1896, c. 968; New York Laws, 1892, c. 513).[4] On June 29, 1906, Congress passed the Burton Act (34 Stat. 626) which prohibited such diversions unless authorized by permit issued by the Secretary of War. This Act was to remain in force for three years but was thereafter twice extended (37 Stat. 43, 631). The Act and the permits granted petitioner's predecessors thereunder finally expired on March 4, 1913.

In the meantime, on May 13, 1910, the International Boundary Water Treaty between the United States and Canada was officially proclaimed (36 Stat. 2448). Article V of the Treaty prohibited any diversion of water from the Niagara River for power purposes unless authorized by the United States.[5]

Following expiration of the Burton Act in 1913 there was no Federal legislation permitting such diversions until 1917 when Congress passed the first of a series of joint resolutions authorizing the Secretary of War to issue revocable permits for limited periods (39 Stat. 867). The last

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[4] In 1903 and 1905 petitioner's predecessors received revocable permission from the U. S. Army Engineers, pursuant to the Rivers and Harbors Act of 1899 (30 Stat. 1121, 1151), to maintain a system of cribs and booms in the river, to meet winter conditions (R. V, 2804–05; 2810–11; 2814–15).

[5] The text of Article V appears in full in Appendix C, pp. 40–41, *infra*.

of these resolutions (under which petitioner or its predecessors received revocable permits, e. g., R. V, 2745–47) was adopted on July 12, 1919 (41 Stat. 163) and contained the following proviso:

> That this resolution shall remain in force until the 1st day of July 1920, and no longer, at the expiration of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversion of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect.

The Federal Water Power Act.—On June 10, 1920, Congress passed permanent legislation—The Federal Water Power Act (41 Stat. 1063) which authorized the Federal Power Commission to issue licenses for hydroelectric projects subject to Federal control upon specified conditions including their recapture by the Federal Government upon payment of the "net investment" therein (Sec. 14).[6] Section 3 of the Act defined the net investment as "the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate

[6] "Net investment" is also the basis for expropriation of excess profits (§§ 10 (d) and (e)), compensation for wartime or emergency use of the project by the United States (§ 16), rate regulation by the Commission (§§ 19 and 20), and court sale of the project if license is revoked (§ 26).

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Commerce Commission', plus similar costs of additions" and minus certain deductions.[7]

Section 23, whose interpretation is involved here, provided for the issuance of "fair value" licenses covering "projects already constructed" to "any person, association, corporation, State, or municipality, holding or possessing" any "permit or valid existing right of way heretofore granted" or "any authority heretofore given pursuant to law."

Petitioner's "fair value" License.—On July 3, 1920, the Commission received a letter from petitioner requesting that it be given a license under the Act (R. IV, 2095), and on January 3, 1921, petitioner filed the requisite formal application (R. IV, 1933–1987). The latter recited that petitioner's water rights consisted of its "common law riparian rights," its ownership of the bed of the Niagara River at the point of diversion, grants and statutory authority from the State of New York, and "the conduct, agreement, and pledge of the Government of the United States whereby a promise was given of a license from the Government of the United States under and in pursuance of and to the full extent permitted" by the 1910 Treaty (R. IV, 1963).

In the hearings held by the Commission in January 1921 on this and nine other applications for licenses to divert water from the Niagara

[7] The relevant provisions of the "classification" are set out in full in Appendix D, pp. 42–47, *infra*.

River, petitioner relied upon its "New York State rights" (R. IV, 2015, 2076). Thereafter, on March 2, 1921, the Commission issued a fifty-year license to petitioner authorizing it to divert 19,500 cubic feet of water per second from the Niagara River through its project (R. IV, 1988–2013).

The license contained a recital that with respect to the project, so far as already constructed, petitioner "had on the 10th day of June, 1920, a permit, right-of-way and authority," and provided in Paragraph 9 that "the fair value of the completed parts of the project as of the date of this license shall be determined as early as practicable in the manner prescribed by the Act * * *" (R. IV, 1988, 2006). Paragraph 10 required the segregation of certain of petitioner's property "in the determination of the fair value of the project already constructed to be hereafter made as provided by Section 23 of the Act" (R. IV, 2006–07).

The terms and conditions of the Act[8] were specifically made part of the license, which also provided that petitioner would be relieved from any condition in the license if it should be adjudicated in any suit by or against the Commission that the Commission "is without authority to impose such condition in granting a license under similar circumstances" (R. IV, 2003, 2011).

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[8] Unless otherwise indicated, all references herein to "the Act" are to the Federal Water Power Act of 1920 (Appendix A, pp. 26–37, *infra*).

Subsequent Commission Proceedings.—In 1927 the Commission on the basis of a comprehensive opinion by its General Counsel, formally decided that a "fair value" license under Section 23 could be issued only to an applicant which possessed a subsisting Federal authorization under which it could, at its option, continue to operate its already constructed project in lieu of obtaining a license under the Act (R. V, 2877–2880).

On February 17, 1930, petitioner was furnished a copy of an opinion of the Commission's Solicitor holding that it was required to accept a determination based on historic cost, rather than fair value, and would have to permit inspection of its pertinent records for that purpose (R. V, 2875–76). On March 17, 1931, petitioner agreed to grant the Commission access to the records of its constituent companies (R. V, 2869).

The results of an accounting and engineering analysis by the Commission's staff were embodied in a report dated July 8, 1938 (R. IV, 2100–2249). The report was served upon petitioner (R. I, 1), which duly filed its protest thereto (R. I, 3–34). Extended hearings were then held between June 1 and November 1, 1939 (R. I, 36–R. III, 1858), and were followed by oral argument before the Commission *en banc* on May 26, 1941.

The Commission's Determination.—On June 9, 1942, the Commission issued its Opinion No. 77 (R. V, 2896–2932) and order determining the

actual legitimate original cost of petitioner's project as of license date, March 2, 1921, and prescribing the accounting therefor (R. V, 2891–94).

In its opinion, the Commission found that the "fair value" provisions of petitioner's license were unauthorized by the Act, since petitioner "did not possess any valid existing permit, right-of-way, or authority from the Federal Government on July 3, 1920 when it applied for a license" and accordingly "could not and did not quality for a fair value license under Section 23" (R. V, 2909). The Commission further found that the unauthorized "fair value" provisions in the license furnished "no basis for legal or equitable estoppel" and that the net investment in petitioner's project had to be determined on the basis of actual legitimate original cost under Section 4 of the Act (R. V, 2909).

The Commission found and allowed $24,680,-680.22 as such actual legitimate original cost, exclusive of certain items (not in issue here) reserved for further consideration (R. V, 2892, 2932). The Commission, in so doing, disallowed three items which had been transferred to petitioner's accounts in the 1918 consolidation: (1) The $328,471.51 added to the book cost of the Schoellkopf distribution facilities when they were transferred to Cliff (see p. 4, *supra*); (2) the $11,800,482.24 added to the book cost of the bal-

ance of the Schoellkopf properties when they were transferred to Hydraulic (see p. 4, *supra*); and (3) the $3,307,975.83 Cataract profit recorded in the construction accounts of Niagara constituent (see pp. 4–5, *supra*). Holding that the 1918 consolidation was not an arm's length transaction, the Commission rejected petitioner's contention that it could not "go behind" the consolidation (R. V, 2928).

Petitioner was directed to correct its accounts to reflect the Commission's determination and charge the disallowances to earned surplus (R. V, 2893–94). Upon application for rehearing, the Commission stayed the accounting requirements it had prescribed and directed petitioner to show cause why such requirements should not be made effective, and to submit such accounting treatment as it might propose for disposition of the disallowances (R. V, 3017–18). Upon consideration of petitioner's response (R. V, 3019–34), the Commission found by its Opinion No. 77–A and order of September 1, 1942 (R. V. 3035–42) that petitioner had failed to show such cause or propose any proper accounting treatment for the disallowances. The stay of the prior order was accordingly dissolved.[9]

The Decision Below.—On petition for review (R. V, 3080–84) the United States Circuit Court of

[9] A subsequent order of October 29, 1942, provided an alternative method of disposing of the disallowances, which petitioner rejected (R. V, 3076–3079).

Appeals for the Second Circuit on July 29, 1943, rendered an opinion (R. VI, 3115–3129) sustaining the Commission's orders subject to a modification not material here. After denying a petition for rehearing (R. VI, 3169), the court entered its judgment affirming the Commission's orders as modified (R. VI, 3170).

ARGUMENT

1. Section 23 of the Act provides for the issuance of "fair value" licenses to "any person, association, corporation, State, or municipality, holding or possessing" any "permit or valid existing right of way heretofore granted, or * * * any authority heretofore given pursuant to law." The Commission and the court below correctly held that only applicants "holding or possessing" valid authority from the Federal Government as of the date of the application are entitled to such a license. Petitioner at the date of its application possessed no such authority, and the Commission and the court therefore correctly held that the "fair value" provision had been inserted by the Commission in the license without legal authority, and was consequently void.

Petitioner apparently does not now contend that on July 3, 1920, the date on which it applied for a license, it possessed any continuing Federal diversion permit.[10] It argues, however, that upon

[10] Petitioner's last Federal authorization—that conferred by the joint resolution of July 12, 1919 (*supra*, pp. 6–7)—was

a proper construction of the section a "fair value" license might legally be issued to any person possessing a permit as of the date the Act became effective. It argues further that the section is not confined to persons holding Federal permits, but may include also those holding rights acquired from the States.

The first of these contentions is plainly without merit. Applications may be made under the section only by persons "holding or possessing" a permit or authority; the phrase "holding or possessing" is clearly inconsistent with a construction that expired permits would suffice.

Petitioner's second contention is likewise unsound. As indicated above (supra, pp. 5–8), the Act was the first comprehensive permanent legislation adopted by Congress to regulate and control the diversion of water subject to federal jurisdiction. It was enacted against a background of existing federal permits.[11] Section 23, providing

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terminated by passage of the Act on June 10, 1920. The permission obtained by petitioner's predecessors under the Rivers and Harbors Act of 1899 to maintain a system of booms in the river was of no avail, for, as the court below held, such permission "gave them no right to take any water" (R. VI, 3118), and any implied consent to the diversions which might be culled from such permission "was curtailed and qualified" by the Burton Act of June 29, 1906, the 1910 Treaty with Canada, and the joint resolutions of 1917 and 1919. See *United States* v. *Grimaud*, 220 U. S. 506, 521.

[11] Prior to the passage of the Act, hydroelectric developments on the public domain had been authorized by permits issued by the Secretary of Interior under the Act of February

for the issuance of "fair value" licenses, was adopted in recognition of the existence of outstanding federal permits, and was intended to induce voluntary applications covering projects already constructed under continuing federal authorizations which would permit their continued operation outside the Act (cf. Pet. 24). That it had no concern with possible existing authorizations derived from the states is demonstrated by the use of the word "State" in the section itself among the categories of persons who may apply for licenses. As the court below pointed out, "a state acts of its own authority and not by grant," and "it would be absurd to suppose that a corporation operating under a state's license could be immune from federal control when the same 'project' would not be, if operated by the state itself" (R. VI, 3119).[12]

15, 1901 (31 Stat. 790), and in the national forests by the Secretary of Agriculture under the Act of March 4, 1911 (36 Stat. 1235, 1253). Developments on navigable streams were governed by the Rivers and Harbors Act of 1899 (30 Stat. 1121) which required a special act of Congress, as well as approval of the Secretary of War. At least 82 such special acts had been passed prior to enactment of the Federal Water Power Act. See Kerwin, *Federal Water Power Legislation*, App. IV (1926).

[12] See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. (2d) 155 (App. D. C.), certiorari denied, 315 U. S. 806, and *Bellows Falls Hydroelectric Corp.*, 2 F. P. C. 380, 386, 37 P. U. R. (N. S.) 257, 262, recognizing the insufficiency of state rights under similar language in subsection (b) of Section 23, which was added by the 1935 amendments to the Act. The *Pennsylvania Water & Power*

Furthermore, the legislative history of the section shows clearly that in considering Section 23 Congress had before it the contentions of petitioner as to its rights derived from the State of New York, and determined not to recognize those rights. After the "fair value" proviso had been added to the section in the Senate (59 Cong. Rec. 1226), an amendment to the first portion of the section was adopted, providing that nothing contained in the Act should be construed "as confirming or otherwise affecting any claim." Senator Wadsworth, who had offered the amendment, explained its purpose as follows (59 Cong. Rec. 1482):

> Mr. WADSWORTH. I have a difficult situation in mind. It is one that the Senator from Wisconsin has often spoken about—*The Niagara Falls situation.* It so happens that the rights that those companies received there years and years ago, as I understand and recollect, came as grants from the State of New York; and *those companies*—rightly or wrongly, I do not know which—*have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water*

Co. case, in addition to being determinative here, disposes of the same question as it may arise in the 1446 investigations referred to in the petition (Pet. 13). As to the 134 outstanding licenses referred to in the petition (Pet. 12), only 13 provide for "fair value," and, as shown by the table in Appendix E, pp. 48–49, *infra*, no similar question can now arise in any of those cases.

> *and the generation of power.* It might be said that that claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. *Now, I do not want this bill in any way to confirm that claim.*[13]

Accordingly, the "fair value" provisions in petitioner's license were unauthorized by Section 23. Being unauthorized, they were void.[14] Cf. *Louisiana* v. *Garfield,* 211 U. S. 70, 77. There is no room for the doctrine of estoppel in such a case as this; to hold the Commission bound by its original error of law would violate the fundamental principle that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit" (*Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409).[15] "Those

[13] Emphasis supplied throughout this brief unless otherwise indicated.

[14] Petitioner seeks to inject into the case an issue as to whether the court below, had it disagreed with the Commission as to the proper interpretation of Section 23, would be bound nevertheless by the Commission's administrative construction (Pet. 4, 12, 18). There is no such issue, for the court below did not regard itself as so bound, but reexamined the question as a matter of first instance and reached its own independent conclusion as to the meaning of the Act.

[15] Thus, "the mistaken view" of the Secretary of War as to whether the Susquehanna River was "navigable" as a matter of law, "even if relied upon by petitioner in the erection of its dam," could not affect the license requirements of Section

dealing with an agent of the United States must be held to have had notice of the limitation of his authority." *Wilber National Bank* v. *United States,* 294 U. S. 120, 123–124. See also *United States* v. *San Francisco,* 310 U. S. 16, 31–32. Nor does the Commission's delay in correcting its error militate against its authority to make such correction at the time when it was called upon to determine the proper valuation of the project.[16] The administrative authority here involved was plainly "in its nature continuing" (*Wilbur* v. *United States,* 281 U. S. 206, 217). The license provided by its terms for a *future* determination of fair value "in the manner prescribed by the Act" (R. IV, 2006); and the only valuation of petitioner's project which the Commission could legally make "in the manner prescribed by the Act" was one based on "actual legitimate original

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23 (b) of the Act. *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. (2d) 155, 162–163 (App. D. C.), certiorari denied, 315 U. S. 806.

[16] It should be noted that there was far less delay than suggested by petitioner. The Commission did not "for seventeen years administratively recognize" the validity of the "fair value" provision of the license (Pet. 4). The license was issued in 1921. In 1927 the Commission formally adopted in a general opinion the construction of the Act which it followed in this case (R. V, 2877–2880), and on February 17, 1930, it advised petitioner specifically that it would be required to accept a determination based on historic cost, rather than "fair value" (R. V, 2875–76). Prior to that time, petitioner had consistently refused the Commission access to its predecessors' books (R. V, 2869).

cost" (Sec. 3), as generally contemplated by the Act except in proper cases under Section 23.[17]

Petitioner can point to no real prejudice resulting from the Commission's correction of the original error. Its project, to the extent that valuation is involved here, had been constructed well before its application for a license in 1921, and therefore in no sense upon the "faith of the earlier construction of the act," or in reliance on the "fair value" provisions of the license later issued (cf. Pet. 19). If the Commission had made no original error, petitioner could have followed no different course than results from the order under review. It would have had to accept the "cost" license which was the only license to which it was by law entitled, for its alternative would have been to risk having its project rendered useless, except as salvage, by action of the Commission in authorizing others to exhaust the maximum diversion of 20,000 c. f. s. allowed by the 1910 treaty. There is no rational basis, nor support in the record, for any inference that the license would have been rejected in the absence of its "fair value" provisions.

2. In determining the actual legitimate original cost of petitioner's project, as required in view of its determination that the "fair value" provi-

[17] Section 28 of the Act, providing against legislative amendment or repeal of the terms of any license, is of no help to petitioner. There has been no such amendment or repeal. Moreover, the protection to be accorded can reasonably apply only to valid provisions of licenses.

sions of petitioner's license were void, the Commission disallowed the three "write-ups," totalling some $15,500,000, which were transferred to petitioner's accounts from those of its constituent companies (Hydraulic, Cliff, and Niagara constituent) in the 1918 consolidation (R. V, 2677; R. II, 1051–1203). These "write-ups" did not represent any investment, but merely arbitrary additions to the book cost of the property, made, as the Commission found, with "no semblance of arm's length bargaining" (R. V, 2921, 2922, 2927).[18]

Petitioner makes no attempt to justify these "write-ups" as items of cost or investment to its predecessors. Instead, it contends that the 1918 consolidation converted the "write-ups" into part of the actual legitimate original cost of the project to it (Pet. 24–27). But this consolidation was merely an exchange of the securities of petitioner for those of its constituent companies—securities having no market value and merely rep-

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[18] The $328,471.51 was added to the book cost of the Schoellkopf distribution facilities when transferred to Cliff, and the $11,800,482.24 was added to the book cost of the balance of the Schoellkopf properties when transferred to Hydraulic. As the Commission found, these transactions "effected no change in the ownership and control of the property" (R. V, 2921, 2922). The balance of the write-up, $3,307,975.83, represented a profit of 33⅓% to Cataract on its development of the Stetson plant (R. IV, 2193) and was included in the construction accounts of Niagara constituent, which was wholly owned by Cataract (R. V, 2927). (See pp. 3–5, *supra*.)

resenting the properties of the constituent companies (R. III, 1510–11)—without any valuation of the properties by either the New York Legislature which authorized the consolidation (N. Y. Laws, 1918, c. 596) or the New York Public Service Commission (R. IV, 2447; R. V, 2928). There was likewise no occasion or incentive for any of the parties to the consolidation to scrutinize each other's property accounts.[19] As a transaction from which arm's length bargaining was absent (R. V, 2928), the 1918 consolidation was properly disregarded by the Commission in favor of the actual investment in the project,[20] in determining actual legitimate original cost.[21]

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[19] The enabling act provided that petitioner's initial capital could equal but not exceed "the aggregate of the outstanding capital stocks and the surpluses, unimpaired reserves and undivided profits" of the consolidating companies (New York Laws, 1918, c. 596).

[20] Section 14 of the Act, authorizing the United States to take over a licensee's project upon expiration of the license, provides that the "net investment * * * in the project" payable to the licensee in such case, "shall not include or be affected * * * by good will, going value, or prospective revenues." The largest of the three write-up items, totalling almost $12,000,000, was made without any inventory or appraisal of the property (R. V, 2540) and was based entirely upon the "probable future earnings" (R. V, 2541; R. IV, 2125).

[21] *Alabama Power Co.* v. *McNinch*, 94 F. (2d) 601, 608 (App. D. C.); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. (2d) 280, 284 (App. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Co.* v. *Federal Power Commission*, 134 F. (2d) 602, 609 (C. C. A. 5); *Puget Sound*

The Commission's determination of the actual legitimate original cost of petitioner's property accords with the definition of "cost" contained in the "Interstate Commerce Commission Classification of Accounts of 1914", which is referred to in the definition of "net investment" in Section 3 of the Act. After full and careful consideration, the court below concluded that the I. C. C. classification contemplates the determination of the "cost of original construction," and held that the Commission's disallowance of items which obviously did not represent "cost of construction" was in accord with such classification (R. VI, 3123). That Congress also so understood the basic approach of the I. C. C. classification is plain from Section 4 (a) of the Act, which requires the licensee of a project to file with the Commission a statement "showing the actual legitimate *cost of construction* of such project," in order to "aid the Commission in determining the net investment" of the licensee therein.

The asserted conflict between the Interstate Commerce Commission and the respondent in interpreting the classification (Pet. 28) is entirely

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Power & Light Co. v. *Federal Power Commission*, 137 F. (2d) 701, 703 (App. D. C.). This has been the consistent practice of the Commission. See, e. g., *Chelan Electric Co., Licensee*, 1 F. P. C. 102, 108, P. U. R. 1933E, 332, 337; *Louisville Hydro-Electric Co., Licensee*, 1 F. P. C. 130, 136, 1 P. U. R. (N. S.) 454, 461; *Lexington Water Power Co., Licensee*, 1 F. P. C. 430, 469, 473.

without foundation. The I. C. C. decisions cited by petitioner (Pet. 26) do not involve a situation like the one at hand, and were moreover decided after the passage of the Federal Water Power Act of 1920. They would consequently not be controlling (cf. *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244). Furthermore, it is clear that Congress meant to incorporate the classification only "as interpreted" by the I. C. C. as of the date of the Act's passage, and regardless of subsequent interpretations by the I. C. C. (Hearings before the Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess., March 18 to May 15, 1918, pp. 40–41). And shortly prior to the passage of the Federal Water Power Act, the I. C. C. had disallowed intercorporate profits of affiliated corporations and had gone behind the "purchase price" to ascertain cost where there had been an absence of arm's length bargaining. *Kansas City Southern Ry. Co.*, 75 I. C. C. 223, 233, 234. As the lower court held, the Commission's action was clearly in accord with the 1914 classification.[22] Indeed, the Commission's interpretation of the 1914 classification in this case is well supported by the Classification itself.[22]

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[22] The general plan of the classification in question is set out in Sections 1 and 2 (18 C. F. R. 103.02–1 and 103.02–2). Section 1 ("Accounts for Investment in Road and Equip-

CONCLUSION

The decision of the court below affirming the Commission's order is correct. There is no conflict and the case presents no question calling for further review. It is therefore respectfully sub-

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ment") provides that the accounts prescribed in this classification are designed to show the "investment of the carrier in property devoted to transportation service." Section 2 ("Items to be Charged") provides that "To these accounts shall be charged the cost of original road, original equipment, road extensions, additions, and betterments"; defines "original road" and "original equipment" as that "provided and arranged or in the original plan for the construction of a new road"; and declares that "Costs shall be actual money costs to the carrier." Section 3 (18 C. F. R. 103.02–3) provides that "The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or improvement of property the cost of which is chargeable to the accounts of this classification is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts." Account 41 of the Classification (18 C. F. R. 103.41) provides that "Where the consideration given for the property *purchased* is other than cash, such consideration shall be valued on a current cash basis," but as all three judges below agreed, the 1918 consolidation, constituting a mutual pooling of the interests of two companies, cannot be regarded as a "purchase" within the meaning of that Account (R. VI, 3124–3125).

Petitioner complains of the conclusion of two of the judges below that "Section 103.41 of the 'Classification' should not be read as incorporated into the Federal Power Act * * * at all" (R. VI, 3125–3126). But, as the concurring judge pointed out in refusing to follow this rationale, the Commission has not gone so far (R. VI, 3130), and until the Commission adopts such a construction, the question is academic.

mitted that the petition for a writ of certiorari be denied.

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